Supreme Court, U.S.
FILED

971637 APR 6 1998

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1997

ROCCO L. SANTUCCI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

STANTON D. LEVENSON
Attorney for Petitioner
905 Grant Building
Pittsburgh, Pennsylvania 15219
(412) 355-0650

145621

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

24 pp

QUESTION PRESENTED FOR REVIEW

Did the court err in refusing to grant Petitioner's Motion to Sever Count Five from Counts One through Four, where Count Five was totally unrelated to Counts One through Four and unfair prejudice resulted from a single trial of all five counts?

PARTIES TO THE PROCEEDING

No other entities appealed to the United States Court of Appeals for the Third Circuit in this or related cases.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iv
Citations to Opinions Below	1
Statement of Jurisdiction	1
Statutes Involved	1
Statement of the Case	1
Reasons for Granting the Writ	3
The Court Below Erred In Denying Petitioner's Motion For Severance Where Neither The Indictment Nor The Government's Pretrial Response Established A Relationship Between The Mail Fraud Counts And The False Statement Count.	3
Conclusion	12

Contents

Page

TABLE OF CITATIONS

Case Cited:

United States v. McGill, 964 F.2d 222 (3rd Cir. 1992) 4, 5, 7

Statutes Cited:

18 U.S.C. § 371 1

18 U.S.C. § 1014 ..... 1, 2

18 U.S.C. § 1341 1

26 U.S.C. § 7206(2) 1

28 U.S.C. § 1254(1) 1

Rules Cited:

Fed. R. Crim. P. 8 4

Fed. R. Crim. P. 8(a) 2, 4

Fed. R. Crim. P. 14 2

Fed. R. Evid. 404(b) 7

Contents

Page

APPENDIX

Appendix A — Judgment Order Of The United States Court Of Appeals For The Third Circuit Dated October 30, 1997 ..... 1a

Appendix B — Order Of The United States Court Of Appeals For The Third Circuit Denying Petition For Rehearing Dated January 6, 1998 ..... 3a

Appendix C — Relevant Statutes 5a

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on January 6, 1998.

CITATIONS TO OPINIONS BELOW

The judgment order of the Court of Appeals is not yet reported and is reprinted in Appendix. Also reprinted in the Appendix is the Order of the Court of Appeals dated January 6, 1998, denying the Petition for Rehearing and Rehearing in Banc.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on January 6, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutory provisions involved are:

18 U.S.C. § 1014

18 U.S.C. § 1341

and are reproduced in Appendix C.

STATEMENT OF THE CASE

On March 20, 1996, the Petitioner and John R. Ludy were indicted on charges of mail fraud in violation of 18 U.S.C. § 1341 (Counts One through Three) and conspiracy to commit mail fraud in violation of 18 U.S.C. § 371 (Count Four). In addition, Ludy was indicted on a tax conspiracy charge in violation of 18 U.S.C. § 371 (Count Five) and on two substantive tax charges in violation of 26 U.S.C. § 7206(2) (Counts Six and Seven).

On April 19, 1996, Ludy pled guilty to Counts Four, Five, Six and Seven. On June 25, 1996, he was sentenced to a term of imprisonment of 30 months, to be followed by a term of supervised release of three years.

On June 4, 1996, a five-count superseding indictment was returned as to Petitioner only (A. 18, Vol. I). The superseding indictment contained the same first four counts as the original indictment, along with a new count charging Petitioner with submitting a false statement to a financial institution in violation of 18 U.S.C. § 1014 (Count Five).

The Petitioner thereafter filed a "Motion for Severance and for Relief from Prejudicial Joinder" pursuant to F.R.Cr.P. 8(a) and 14 (A. 31, Vol. I). On July 29, 1996, the court denied the motion (A. 47, Vol. I).

Petitioner's jury trial began on July 29, 1996 and concluded on August 8, 1996. He was found not guilty of two counts of mail fraud (Counts One and Two) and of the false statement charge (Count Five), but was convicted of mail fraud (Count Three) and conspiracy to commit mail fraud (Count Four).

On January 31, 1997, the Petitioner was sentenced to a term of imprisonment of 21 months, to be followed by a term of supervised release of three years (A. 37-43, Vol. I). An appeal was filed on February 4, 1997 (A. 1, Vol. I).

On April 27, 1997, Petitioner's "Motion fro Release Pending Appeal" was granted (A. 16, Vol. I).

At trial, the government established that an individual named Michael Carlow owned a number of businesses including Pittsburgh Food and Beverage Company, Pittsburgh Brewing Company, Belot Concrete Block Company and United Mutual

Insurance Company. In addition, he owned 51% of Petitioner's insurance agency, Santucci Insurance, Inc. (A. 849, Vol. III). The Petitioner was Carlow's insurance advisor.

The mail fraud charges (Counts One through Four) alleged that Petitioner defrauded two insurance companies through the submission of false payroll figures in order to obtain lower workers compensation premiums for Pittsburgh Brewing Company. Count Five alleged that Petitioner made a false statement in connection with a $ 1.1 million loan obtained by Belot Concrete Block Company from Belmont National Bank.

At trial, Petitioner denied that he ever knowingly provided false payroll figures to any insurance company. He testified that any payroll figures he provided were supplied to him by Carlow's controller, John Ludy, and he had no reason to doubt their legitimacy (A. 825-828, Vol. III).

Petitioner likewise denied knowingly making a false statement to Belmont National Bank (A. 818, 819, Vol. III). In addition, he presented 13 character witnesses who attested to his excellent reputation for honesty and integrity (A. 897-937, Vol. III).

REASONS FOR GRANTING THE WRIT

THE COURT BELOW ERRED IN DENYING PETITIONER'S MOTION FOR SEVERANCE WHERE NEITHER THE INDICTMENT NOR THE GOVERNMENT'S PRETRIAL RESPONSE ESTABLISHED A RELATIONSHIP BETWEEN THE MAIL FRAUD COUNTS AND THE FALSE STATEMENT COUNT.

Petitioner was denied his right to a fair trial where a count of submitting a false statement to a financial institution was

improperly joined with four mail fraud counts. The joint trial of these unrelated charges was fundamentally unfair and resulted in prejudice to the Petitioner. The joinder of two or more offenses is permitted pursuant to F.R.Cr.P. 8(a) where they

> . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting part of a common scheme or plan.

Thus, joinder is permitted in three instances: (1) where two or more offenses are of the same or similar character; or (2) where they are based on the same act or transaction; or (3) where they are based on two or more acts or transactions connected together or constituting part of a common scheme or plan.

Here, it is clear that Count Five was not based on the same act or transaction as Counts One through Four. Therefore, joinder was only proper if the offenses were of the same or similar character or were connected together or constituted a part of a common scheme or plan.

When a severance ruling is challenged on appeal, "this court must make an 'independent determination' as to whether or not the joinder of counts under Fed. R. Crim. P. 8 was improper." *United States v. McGill,* 964 F.2d 222, 241 (3rd Cir. 1992). In making this determination, ". . . the reviewing court must look to the indictment and not the subsequent proof adduced at trial." *United States v. McGill, supra,* at 241.

An examination of this indictment fails to reveal any basis for the joinder of Count Five with Counts One through Four.

There is clearly a relationship between Counts One through Four which charged mail fraud and conspiracy to commit mail

fraud. In those counts, the Petitioner is alleged to have defrauded two insurance companies through the submission of false payroll figures in order to obtain lower workers compensation premiums for Pittsburgh Brewing Company.

Count Five, the false statement charge, is totally unrelated to the insurance fraud charged in Counts One through Four. Initially, it should be noted that the company involved in the alleged mail fraud is Pittsburgh Brewing Company, while the company involved in the false statement charge is Belot Concrete Block Company — two separate entities. Count Five charges the Petitioner with making a false statement in connection with a $1.1 million loan obtained by Belot Concrete Block Company from Belmont National Bank. Specifically, it is alleged that the Petitioner created a false insurance certificate which was submitted to the bank in connection with the loan.

Plainly, Count Five is not of the "same" or "similar" character as Counts One through Four. The mere fact that Count Five and Counts One through Four charge fraud-type offenses does not make them ofthe "same" or "similar" character. Moreover, the schemes to defraud set forth in Counts One through Four and Count Five are totally unrelated. Therefore, they are not ". . . based on the same act or transaction or on two or more acts or transactions connected together or constituting part of a common scheme or plan."

Thus, on the face of the indictment, the mail fraud charges and the false statement charge do not appear to have any connection. Accordingly, the indictment fails to establish any basis for the joinder. However, *United States v. McGill,* 964 F.2d at 242 instructs:

> Trial judges may look beyond the face of the indictment to determine proper joinder in limited

> circumstances. Where representations made in pretrial documents other than the indictment clarify factual connections between the counts, reference to those documents is permitted.

Even considering the "government's pretrial response", it nonetheless remains apparent that joinder was improper because the schemes to defraud were unrelated.

The "government's pretrial response" adds the following information relevant to this issue:

> 1. The government represented that its evidence at trial would show the Defendant's role in the Carlow organization was to handle insurance matters of all types (GSA 49, 50).
>
> 2. With regard to the mail fraud counts, it was the government's theory that the Defendant knowingly supplied false payroll figures to Pittsburgh Brewing Company's workers' compensation carriers in order to obtain artificially low premiums (GSA 50).
>
> 3. With regard to the false statement charge (Count Five), it was the government's theory that the Defendant caused ". . . an insurance certificate in the name of United Mutual Insurance Company (UMIC), a Carlow company which was grossly undercapitalized and not licensed to provide insurance, to be provided to the Belmont national Bank as proof that real property which constituted the collateral for a loan was insured." (GSA 50).

The "government's pretrial response" fails to reveal a sufficient basis for the joinder of Count Five with Counts One through Four. The mail fraud counts allege a scheme to defraud

Pittsburgh Brewing Company's workers' compensation carriers. Thus, the insurance companies are the victims of that alleged scheme. On the other hand, the false statement count alleges that an insurance company (UMIC) victimized a bank (Belmont National Bank). As the court stated in *United States v. McGill, supra,* at 240:

> Under Rule 8(a), we look to whether the offenses charged are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Thus, considering both the indictment and the "government's pretrial response", it is clear that the schemes to defraud were unrelated. Accordingly, Count Five was misjoined with Counts One through Four."[1]

The Petitioner was acquitted of the false statement charge (Count Five) and two substantive mail fraud charges (Counts One and Two); however, he was convicted on one substantive mail fraud charge (Count Three) and conspiracy to commit mail fraud (Count Four). He is entitled to a reversal of those convictions because actual prejudice resulted from the misjoinder. As the Court held in *United States v. McGill, supra,* at 241:

> If the reviewing court determines that counts have been improperly joined, it must then apply a harmless error analysis, reversing the trial court if the misjoinder resulted in actual prejudice to the defendant.

---

1. Contrary to the government's assertion, evidence from one scheme would not have been admissible at the trial of the other pursuant to F.R.E. 404(b) since the schemes were unrelated and were not part of a common plan or scheme.

In his pretrial "Motion for Severance and for Relief from Prejudicial Joinder", Petitioner argued that he would suffer prejudice from a joint trial of unrelated offenses (A. 34, Vol. I). Unfortunately, this prediction was accurate.

As stated, the subject of Count Five was a $1.1 million loan obtained by Belot Concrete Block Company from Belmont National Bank. The bank made the loan on February 25, 1986 (A. 735, Vol. III). The loan was collateralized with Belot's real estate, rolling stock and equipment which Belot was required to insure (A. 735, 736, Vol. III). Specifically, the government charged that Petitioner created a false insurance certificate purportedly covering Belot's collateral which was submitted to the bank in connection with the loan. The certificate of insurance was issued by United Mutual Insurance Company ("UMIC"), a Carlow-owned selfinsurance company (A. 739, Vol. III).

It was the government's theory that UMIC was a "sham" in that it was grossly undercapitalized and, as a result, the insurance certificate in question was worthless. Petitioner did not deny that he directed a Carlow employee to issue the insurance certificate. He contended, however, that he believed UMIC to be a legitimate insurance company, and he therefore lacked knowledge that the insurance certificate was a fraud (A. 818, 819, Vol. III).

The government went to great lengths to prove that UMIC was a sham. Out of a total of 23 witnesses called by the government, nine testified about UMIC, Victoria Pilossoph, John Martin, Mary Jeanne Nobers, Mary Barron, Sharon Robb, Judy Schrenk, William Wallace, Michael Miller and FBI Agent James M. Roth.

John Martin, who was the credit manager of all Carlow companies (A. 681, Vol. II), was listed as the president of UMIC

(A. 683, Vol. II). He testified that his position was a "joke" because he had no power, authority or control (A. 685, Vol. II). Martin also testified that UMIC's "home office" was a post office drop in a grocery store in Worthington, Ohio (A. 686, Vol. II) and that calls to UMIC's office in Ohio were call-forwarded to Petitioner's office in Pittsburgh (A. 687, Vol. II). Finally, he testified that he and Petitioner were "frustrated" with UMIC (A. 640, Vol. II) and that Petitioner referred to UMIC as a "joke" (A. 642, Vol. II).

Mary Jeanne Nobers, a key Carlow employee, testified that UMIC wasn't a "real" insurance company (A. 664, 665, Vol. II). It had no money or reserves to pay any claims (A. 665, Vol. II) and didn't have any employees (A. 666, Vol. II). She also testified that she and Petitioner "joked" about UMIC (A. 667, Vol. II).

Carlow's primary personal secretary, Mary Barron (A. 682, Vol. II), testified that Carlow invented the fictitious name "Edward Stone" which appeared on the UMIC insurance certificate as the authorized company signature (A. 686, Vol. II). At Carlow's instruction, she signed Stone's name to numerous insurance certificates (A. 686, 692-99, Vol. II).

The government also produced evidence that UMIC never had a certificate to conduct business in Pennsylvania (A. 712, Vol. II).

Victoria Pilossoph did general secretarial work for Pittsburgh Food and Beverage (A. 596, Vol. II). She testified that, at Petitioner's request, she prepared UMIC's insurance certificates and gave them to Mary Barron who would then sign "Edward L. Stone" (A. 599, Vol. II). Since UMIC's address was in Ohio, another Carlow employee would physically take the certificates to Ohio for mailing (A. 601, Vol. II).

Pilossoph also testified that she signed Stone's name to four or five insurance certificates (A. 602, Vol. II). Finally, she testified that on Petitioner's instruction, she prepared the UMIC insurance certificate which was sent to Belmont Bank in connection with the Belot loan (A. 604, Vol. II).

Michael Miller, who was president of L.E. Smith Glass Company (A. 753, Vol. III), a Carlow company, testified that, without his knowledge, he was listed as vice president of UMIC (A. 756, Vol. III).

FBI Agent James M. Roth testified as to UMIC's undercapitalization. He testified that UMIC did not file tax returns for the years 1991, 1992 and 1993 (A. 768, Vol. III) and that its gross receipts in 1990 were $12,421 (A. 767, Vol. III). He further testified that in both 1989 and 1990, UMIC issued insurance certificates in excess of $27 million; in 1991, it issued insurance in excess of $14 million; and in 1993 it issued insurance in excess of $4.4 million (A. 770, Vol. III). Finally, he testified that in 1994, while UMIC's net worth was approximately $35,000, it issued insurance in excess of $10 million (A. 770, 771, Vol. III).

The govemment prosecutor devoted a significant portion of his closing argument to Count Five (A. 971-981, Vol. III). In fact, he went beyond the specific fraudulent insurance certificate which was the subject matter of Count Five and argued to the jury ". . . is what happened with **every** UMIC certificate that was issued. . . ." (A. 973, Vol. III). And he discussed the companies which received UMIC insurance certificates and characterized them as ". . . the innocent party that's being duped" (A. 974, Vol. III).

The prosecutor ridiculed UMIC:

> it's a post office box. A post office box that incredibly is at a grocery store. That's the headquarters of UMIC, a grocery store. As Mr.

> Martin told you, when they changed the post office to a United States post office, they joked about this post office building being the UMIC headquarters.

(A. 975, Vol. III). He referred to UMIC as a "charade" (A. 975, Vol. III) and said "I think it's fair to call the call-forwarding a charade" (A. 976, Vol. III).

He talked about employees' claims not being paid by UMIC and described the situation as a "disgrace" (A. 977, Vol. III). He analogized the insurance certificate to counterfeit money (A. 977, Vol. III).

The prosecutor characterized Petitioner's testimony regarding the fictitious Edward Stone as "absolutely preposterous" (A. 978, Vol. III). And then he made this comment:

> And yet Mr. Santucci has the gall to sit there and to sit on the witness stand and tell you this (sic) past couple days that he still believes, knowing all this, that UMIC is legitimate. I suggest to you that that is just not believable. It's a position he must cling to desperately to avoid conviction on Count Five, but it's not believable.

(A. 981, Vol. III).

The prosecutor was thus able to use the evidence regarding Count Five to ridicule the Defendant and launch an attack on his credibility. The evidence supporting Count Five was clearly the most inflammatory and provocative evidence adduced, and the prosecutor took full advantage of it in his closing argument.

In his rebuttal closing, the prosecutor again devoted a significant portion of his argument to the false statement charge (A. 1014-1017, Vol. III).

Even though the jury acquitted Petitioner of Count Five, it obviously heard all of the evidence relating to that count as well as the prosecutor's two closing arguments. It would be unrealistic to conclude that all of that damaging evidence and the prosecutor's arguments did not play a substantial role in what was obviously a compromise verdict. The prejudice to the Petitioner is manifest.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

STANTON D. LEVENSON
Attorney for Petitioner
905 Grant Building
Pittsburgh, Pennsylvania 15219
(412) 355-0650